

ORAL ARGUMENT NOT YET SCHEDULED

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 06-1403  
Consolidated with Nos. 06-1427 and 07-1193

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MAINE PUBLIC UTILITIES COMMISSION,  
RICHARD BLUMENTHAL, ATTORNEY GENERAL FOR CONNECTICUT, &  
MARTHA COAKLEY, ATTORNEY GENERAL FOR MASSACHUSETTS,  
*Petitioners*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent*

*On Petitions for Review of Orders of the  
Federal Energy Regulatory Commission*

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BRIEF FOR PETITIONERS

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Dated: August 20, 2007

(Names, Addresses and Telephone Numbers of Counsel are provided in overleaf)

KURT ADAMS  
LISA FINK  
STATE OF MAINE  
PUBLIC UTILITIES COMMISSION  
242 State Street  
18 State House Station  
Augusta, ME 04333-0018  
(207) 287-1389

*Attorneys for Petitioner Maine  
Public Utilities Commission*

RICHARD BLUMENTHAL  
ATTORNEY GENERAL FOR  
THE STATE OF CONNECTICUT

*Attorneys for Petitioner Richard Blumenthal,  
Attorney General for the State of Connecticut*

MARTHA COAKLEY  
ATTORNEY GENERAL FOR  
THE COMMONWEALTH OF  
MASSACHUSETTS

*Attorney for Petitioner Martha Coakley,  
Attorney General for the Commonwealth of Massachusetts*

LISA S. GAST  
L. ELISE DIETERICH  
DUNCAN, WEINBERG, GENZER  
& PEMBROKE, PC  
1615 M St. NW – Suite 800  
Washington, DC 20036-3203  
(202) 467-6370

MICHAEL C. WERTHEIMER  
JOHN S. WRIGHT  
ASST. ATTORNEYS GENERAL  
CONNECTICUT OFFICE OF THE  
ATTORNEY GENERAL  
10 Franklin Square  
New Britain, CT 06051  
(860) 827-2620

JESSE S. REYES  
ASST. ATTORNEY GENERAL  
OFFICE OF THE MASSACHUSETTS  
ATTORNEY GENERAL  
ENERGY AND TELECOM  
DIVISION  
One Ashburton Place, 18<sup>th</sup> Fl.  
Boston, MA 02108-1598  
(617) 727-2200 (Ext. 2432)

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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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v.

Federal Energy Regulatory Commission

Respondent.

Case No. 06-1403

Consolidated with  
Case Nos. 06-1427  
and 07-1193

**PETITIONERS' CERTIFICATE AS TO PARTIES, RULINGS, AND  
RELATED CASES**

**A. Parties and *Amici Curiae***

**1. Parties before the Agency**

**i. Case Nos. 06-1403 and 06-1427**

The parties and intervenors appearing in the proceeding below before the Federal Energy Regulatory Commission, FERC Docket Nos. ER03-563, *et al.*, are listed in Appendix A to this Certificate.

**ii. Case No. 07-1193**

The parties and intervenors appearing in the proceeding below before the Federal Energy Regulatory Commission, FERC Docket Nos. ER06-1465, *et al.*, are listed in Appendix B to this Certificate.

## 2. Parties Before This Court

Petitioners: Maine Public Utilities Commission  
Massachusetts Attorney General  
Connecticut Attorney General

Respondent: Federal Energy Regulatory Commission

Intervenors: Connecticut Dept. of Public Utility Control  
TransCanada Power Marketing LTD.  
International Power America, Inc.  
Bridgeport Energy, LLC  
Casco Bay Energy Company, LLC  
NE Power Pool Participants Committee  
Milford Power Company, LLC  
FPL Energy, LLC  
Entergy Nuclear Generation Company, LLC  
Entergy Nuclear Vermont Yankee, LLC  
Mirant Energy Trading, LLC  
Mirant Kendall, LLC  
Mirant Canal, LLC  
Boston Generation, LLC  
Mystic I, LLC  
Mystic Development, LLC  
Fore River Development, LLC  
Industrial Energy Consumer Group  
NEPOOL Industrial Customer Coalition  
NRG Power Marketing, Inc.  
Connecticut Jet Power, LLC  
Devon Power, LLC  
Norwalk Power, LLC  
Middletown Power, LLC  
Montville Power, LLC  
Somerset Power, LLC  
MA Municipal Wholesale Electric Company  
Conn. Municipal Electric Energy Cooperative  
ISO New England Inc.  
Lake Road Generating Company  
NSTAR Electric & Gas Corporation  
Berkshire Power Company, LLC

Masspower  
Dominion Resources, Inc.  
Dominion Energy Marketing, Inc.  
Dominion Nuclear Connecticut, Inc.  
Central Vermont Public Service Corporation  
PSEG Power LLC  
PSEG Energy Resources & Trade LLC

*Amici Curiae:* PJM Interconnection, LLC

**B. Rulings Under Review**

The Maine Public Utilities Commission, (“MPUC”) Petitioner in Case No. 06-1403, and Richard Blumenthal, Attorney General for the State of Connecticut (“CTAG”) and Martha Coakley, Attorney General for the Commonwealth of Massachusetts (“MassAG”), Petitioners in Case No. 06-1427 (MPUC, CTAG and MassAG hereinafter collectively referred to as, “Petitioners”), have filed Petitions for Review of the following orders of the Federal Energy Regulatory Commission (“FERC” or “Commission”):

- 1) *Devon Power, LLC*, FERC Docket No. ER03-563-060, “Order on Rehearing and Clarification,” 117 FERC ¶ 61,133 (October 31, 2006), R1149.
- 2) *Devon Power, LLC*, FERC Docket Nos. ER03-563-030 and -055, “Order Accepting Proposed Settlement Agreement,” 115 FERC 61,340 (June 16, 2006), R1129.

On January 10, 2007, the Court consolidated Case No. 06-1403 with Case No. 06-1427.

In addition, MPUC, Petitioner in Case No. 07-1193, has filed a Petition for Review of the following orders of the FERC:

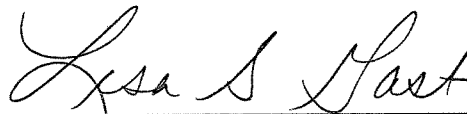
- 1) *ISO New England, Inc. and New England Power Pool*, FERC Docket No. ER06-1465-001, "Order Denying Rehearing," 119 FERC ¶ 61,044 (April 13, 2007), R1203.
- 2) *ISO New England, Inc. and New England Power Pool*, FERC Docket No. ER06-1465-000, "Order Accepting Tariff Sheets," 117 FERC ¶ 61,132 (October 31, 2006), R1197.

On June 21, 2007, the Court issued an Order granting MPUC's motion to consolidate Case No. 07-1193 with Case Nos. 06-1403 and 06-1427.

**C. Related Cases**

FERC's Orders for which Petitioners seek review in this consolidated matter have, to the best of counsel's knowledge, not previously been before this Court or any other court.

Respectfully submitted,



---

LISA S. GAST  
L. ELISE DIETERICH  
DUNCAN, WEINBERG, GENZER  
& PEMBROKE, PC  
1615 M St. NW – Suite 800  
Washington, DC 20036-3203  
(202) 467-6370

KURT ADAMS  
LISA FINK  
STATE OF MAINE  
PUBLIC UTILITIES COMMISSION  
242 State Street  
18 State House Station  
Augusta, ME 04333-0018  
(207) 287-1389

*Attorneys for Petitioner Maine  
Public Utilities Commission*

RICHARD BLUMENTHAL  
ATTORNEY GENERAL FOR  
THE STATE OF CONNECTICUT

MICHAEL C. WERTHEIMER  
JOHN S. WRIGHT  
ASSISTANT ATTORNEYS GENERAL  
CONNECTICUT OFFICE OF THE  
ATTORNEY GENERAL  
10 Franklin Square  
New Britain, CT 06051  
(860) 827-2620

*Attorneys for Petitioner Richard  
Blumenthal,  
Attorney General for the State of  
Connecticut*

MARTHA COAKLEY  
ATTORNEY GENERAL FOR THE  
COMMONWEALTH OF  
MASSACHUSETTS

JESSE S. REYES  
ASSISTANT ATTORNEY GENERAL  
OFFICE OF THE MASSACHUSETTS  
ATTORNEY GENERAL  
ENERGY & TELECOM DIVISION  
One Ashburton Place, 18<sup>th</sup> Fl.  
Boston, MA 02108-1598  
(617) 727-2200 (Ext. 2432)

*Attorney for Petitioner Martha Coakley,  
Attorney General for the Commonwealth of  
Massachusetts*



**APPENDIX A to  
PETITIONERS' CERTIFICATE AS TO PARTIES, RULINGS, AND  
RELATED CASES**

Parties and intervenors appearing before the Federal Energy Regulatory  
Commission in FERC Docket Nos. ER03-563, *et al.*:

American Forest & Paper Association  
American National Power, Inc.  
Berkshire Power Company, LLC  
Black Oak Capital, LLC  
Boston Generating, LLC  
Braintree Electric Light Department  
Bridgeport Energy, LLC  
Brunenkant & Cross, LLP  
Calpine Eastern  
Cape Wind Associates, LLC  
Casco Bay Energy Company, LLC  
Central Vermont Public Service Corp.  
Concord Municipal Light Plant  
ConEdison Energy  
Connecticut Dept. of Public Utility Control  
Connecticut Industrial Energy Consumers  
Connecticut Municipal Electric Energy Coop.  
Connecticut Office of Attorney General  
Connecticut Office of Consumer Counsel  
Conservation Services Group Inc.  
Constellation Power Source LLC  
Coral Power LLC  
CPV Milford, LLC  
Devon Power LLC  
Dominion Energy Marketing, Inc.  
Dominion Resources, Inc.  
DTE Energy Trading, Inc.  
Duke Energy North America, LLC  
Electric Power Supply Association  
Electricity Consumers Resource Council  
Energy Consortium  
Energy Management, Inc.  
Entergy Nuclear Generation Company  
EPIC Merchant Energy, LP  
Exelon Business Services Company  
Exelon Generating Company, LLC

FirstLight Parties  
Fitchburg Gas & Electric Light Company  
FPL Energy, Inc.  
Granite Ridge Energy, LLC  
H.Q. Energy Services (U.S.) Inc.  
Independent Energy Producers of Maine  
Industrial Energy Consumer Group  
IRH Management Committee  
ISO New England Inc.  
Kennebec Hydro Resources  
KeySpan Ravenwood, Inc.  
Kleen Energy Systems, LLC  
Lake Road Generating Company, L.P.  
Long Island Power Authority  
MA Municipal Wholesale Electric Co.  
Maine Public Advocate Office  
Maine Public Utilities Commission  
Massachusetts Dept. of Telecom & Energy  
Massachusetts Office of Attorney General  
Masspower  
Metropolitan Water District of Southern California  
Middletown Power Company LLC  
Milford Power Company LLC  
Millennium Power Partners, LLC  
Mirant Corporation  
Montville Power LLC  
Morgan Stanley Capitol Group Inc.  
Mystic I, LLC,  
National Grid USA  
NEPOOL Industrial Customer Coalition  
New England Conference of Public Utilities Commissioners  
New England Consumer-Owned Entities  
New England Demand Response Providers  
New England Power Pool Participants Committee  
New Hampshire Electric Cooperative, Inc.  
New Hampshire Office of Consumer Advocate  
New Hampshire Public Utilities Commission  
New Orleans City Council  
New York Independent System Operator. Inc.  
Northeast Utilities Service Company  
Norwalk Power LLC  
NRG Companies  
NRG Energy, Inc  
NSTAR Electric & Gas Corp.  
Nxegen, Inc.  
PG&E National Energy Group

Pinpoint Power, LLC  
PPL EnergyPlus, LLC  
PPL Wallingford Energy LLC  
PSEG Companies  
Public Service Commission of Maryland  
Reading Municipal Light Department  
Rhode Island Dept. of Attorney General  
Rhode Island Public Utilities and Carriers  
Select Energy, Inc.  
Sith Boston Generating, LLC  
Southwestern Area Commerce and Industry Assn. of Connecticut  
State of Maine  
Strategic Energy, LLC  
Taunton Municipal Lighting Plant  
TransCanada Power Marketing Ltd.  
United Illuminating Company  
Unitil Service Corporation  
Vermont Department of Public Service  
Wellesley Municipal Light Plant & Concord Municipal  
Wellesley Municipal Light Plant  
Wisconsin Electric Power Company

**APPENDIX B to  
PETITIONERS' CERTIFICATE AS TO PARTIES, RULINGS, AND  
RELATED CASES**

Parties and intervenors appearing before the Federal Energy Regulatory

Commission, FERC Docket Nos. ER06-1465, *et al.*:

ANP FUNDING I, LLC  
Bridgeport Energy, LLC  
Casco Bay Energy Company, LLC  
Connecticut Dept. of Public Utility Control  
Conservation Law Foundation  
Dominion Energy Marketing, Inc.  
Dominion Energy New England, Inc.  
Dominion Nuclear Connecticut, Inc.  
Dominion Retail, Inc.  
Exelon Corporation  
H.Q. Energy Services (U.S.) Inc.  
ISO New England Inc.  
Long Island Power Authority  
Maine Public Utilities Commission  
Massachusetts Dept. of Telecom & Energy  
Milford Power Company, LLC  
Mirant Parties  
NEPGA  
New England Conference of Public Utilities Commissioners  
Northeast Utilities Service Company  
NRG Companies  
TransCanada Power Marketing Ltd.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, the Petitioners assert as follows:

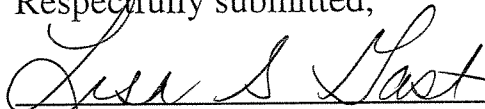
The Maine Public Service Commission ("MPUC") hereby submits that it is a governmental party exempt from any reporting requirement under Rule 26.1.

MPUC has no parent corporation or publicly held stock.

Richard Blumenthal, Attorney General for the State of Connecticut ("CTAG") hereby submits that the Office of the Attorney General is a governmental party exempt from any reporting requirement under Rule 26.1. The CTAG is the chief civil legal officer of the State of Connecticut and has no parent corporation or publicly held stock.

Martha Coakley, Attorney General for the Commonwealth of Massachusetts ("MassAG"), hereby submits that the Office of the Attorney General is a governmental party exempt from any reporting requirement under Rule 26.1. The MassAG is the chief civil legal officer of the Commonwealth of Massachusetts and has no parent corporation or publicly held stock.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Lisa S. Gast", is written over a horizontal line.

LISA S. GAST

L. ELISE DIETERICH

DUNCAN, WEINBERG, GENZER  
& PEMBROKE, PC

1615 M St. NW – Suite 800  
Washington, DC 20036-3203  
(202) 467-6370

KURT ADAMS  
LISA FINK  
STATE OF MAINE  
PUBLIC UTILITIES COMMISSION  
242 State Street  
18 State House Station  
Augusta, ME 04333-0018  
(207) 287-1389

*Attorneys for Petitioner Maine  
Public Utilities Commission*

RICHARD BLUMENTHAL  
ATTORNEY GENERAL FOR  
THE STATE OF CONNECTICUT

MICHAEL C. WERTHEIMER  
JOHN S. WRIGHT  
ASSISTANT ATTORNEYS GENERAL  
CONNECTICUT OFFICE OF THE  
ATTORNEY GENERAL  
10 Franklin Square  
New Britain, CT 06051  
(860) 827-2620

*Attorneys for Petitioner Richard  
Blumenthal,  
Attorney General for the State of  
Connecticut*

MARTHA COAKLEY  
ATTORNEY GENERAL FOR THE  
COMMONWEALTH OF  
MASSACHUSETTS

JESSE S. REYES  
ASSISTANT ATTORNEY GENERAL  
OFFICE OF THE MASSACHUSETTS  
ATTORNEY GENERAL  
ENERGY & TELECOM DIVISION  
One Ashburton Place, 18<sup>th</sup> Fl.  
Boston, MA 02108-1598  
(617) 727-2200 (Ext. 2432)

*Attorney for Petitioner Martha Coakley,  
Attorney General for the Commonwealth of  
Massachusetts*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iv
GLOSSARY .....	ix
I. JURISDICTIONAL STATEMENT .....	2
II. STATEMENT OF ISSUES .....	4
III. STATUTES AND REGULATIONS .....	4
IV. STATEMENT OF THE CASE.....	4
V. STATEMENT OF FACTS.....	7
A. Background .....	7
1. Locational Marginal Pricing .....	7
2. The <i>Devon</i> Orders.....	8
B. LICAP litigation.....	9
C. The Contested Settlement .....	12
VI. STANDARD OF REVIEW .....	22
VII. SUMMARY OF ARGUMENT .....	25
VIII. STANDING.....	27
IX. ARGUMENT .....	30
A. FERC's decision to accept, as just and reasonable, the Contested Settlement without sufficient record evidence to support the Transition Payments, is arbitrary, capricious and inconsistent with the public interest.....	30
1. The record contains no cost support for FERC's conclusion that the Transition Payments result in just and reasonable	



compensation for existing generation or fall within the reasonable range of capacity prices.....	31
a. There is no record evidence of costs of existing generators.....	31
b. FERC's reliance on the Cost of New Entry was unjust and unreasonable. ....	38
c. FERC's reliance on possible outcomes of proposed models it neither vetted nor found to be just and reasonable in determining that the Transition Payments fall within the reasonable range of capacity prices was arbitrary and capricious.....	39
2. FERC's failure to respond meaningfully to Petitioners' and Intervenor's objections was arbitrary and capricious.....	41
3. FERC acted arbitrarily and capriciously in ordering an overbroad remedy to the market problem it identified.....	42
B. FERC's rejection, as irrelevant, of evidence demonstrating that there should be locational pricing in the transition period was arbitrary and capricious. ....	43
1. FERC acted arbitrarily and capriciously when it rejected, as irrelevant, evidence of differences in prices between Maine and the rest of New England. ....	44
2. FERC acted arbitrarily and capriciously by approving a non-locational capacity structure which it had previously found to be unjust and unreasonable. ....	49
C. FERC's acceptance of a settlement which deprives non-settling parties of their rights under the FPA results in a settlement which is unjust, unreasonable and inconsistent with the public interest. ....	52
D. FERC is without jurisdiction to implement the FCM mechanism. ....	55
1. The FPA precludes FERC from implementing the FCM mechanism to force states to acquire a specific level of capacity. ....	56

2.	FERC has no reasonable basis to construe implicit authority to require states to purchase specific levels of generation.....	60
----	--	----

X.	CONCLUSION.....	64
----	-----------------	----

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Ala. Elec. Coop, Inc. v. FERC</i> , 684 F.2d 20 (D.C. Cir. 1982) .....	31
<i>Atlantic City Elec. Co. v. FERC</i> , 295 F.3d 1 (D.C. Cir. 2002) .....	22
<i>Borough of Lansdale v. Fed. Power Comm’n</i> , 494 F.2d 1104 (D.C. Cir. 1974) .....	52
<i>Brown v. Gardner</i> , 513 U.S. 115 (1994) .....	23
<i>Cal. Indep. Sys. Operator Corp. v. FERC</i> , 372 F.3d 395 (D.C. Cir. 2004) .....	22, 23
* <i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> 467 U.S. 837 (1984) .....	22, 23, 59
<i>Connecticut Department of Public Utility Control v. FERC</i> , 484 F.3d 558 (D.C. Cir. 2007) .....	61
<i>EEOC v. Waffle House, Inc.</i> , 534 U.S. 279 (2002) .....	52
<i>Exxon Mobil Corp. v. FERC</i> , 315 F.3d 306 (D.C. Cir. 2003) .....	49
* <i>Federal Power Commission v. Sierra Pacific Power Co.</i> , 350 U.S. 348 (1956) .....	51, 52, 53
<i>Gonzales v. Oregon</i> , 126 S. Ct. 904 (2006) .....	58, 60
<i>Greater Boston Television Corp. v. FCC</i> , 444 F.2d 841 (D.C. Cir. 1970) ....	22
* <i>Laclede Gas Co. v. FERC</i> , 997 F.2d 936 (D.C. Cir. 1993) .....	29, 47
<i>Londonderry Neighborhood Coalition v. FERC</i> , 273 F.3d 416 (1st Cir. 2001) .....	57

\*Authorities upon which Petitioners chiefly rely are marked with asterisks.

<i>MCI Telecomms. Corp. v. AT&amp;T Co.</i> , 512 U.S. 218 (1994).....	60
<i>Me. Public Utils. Comm’n v. FERC</i> , 454 F.3d 278 (D.C. Cir. 2006) .....	25, 52
<i>Metro Edison Co. v. FERC</i> , 595 F.2d 851 (D.C. Cir. 1979).....	52
<i>Michigan v. EPA</i> , 268 F.3d 1075 (D.C. Cir. 2001).....	23
<i>Miss. Indus. v. FERC</i> , 808 F.2d 1525 (D.C. Cir. 1987).....	55, 60, 61
<i>Motion Picture Ass’n of America, Inc. v. FCC</i> , 309 F.3d 796 (D.C. Cir. 2002).....	23
<i>Municipalities of Groton v. FERC</i> , 587 F.2d 1296 (D.C. Cir. 1978).....	60, 61
<i>New York v. FERC</i> , 535 U.S. 1 (2002).....	58, 59
<i>*NorAm Gas Transmission v. FERC</i> , 148 F.3d 1158 (D.C. Cir. 1998).....	22, 47
<i>Northeast Utilities Service Co. v. FERC</i> , 55 F.3d 686 (1st Cir. 1995) .....	53
<i>*NSTAR Electric &amp; Gas Corp. v. FERC</i> , 481 F.3d 794 (D.C. Cir. 2007).....	31, 32, 36, 40
<i>PPL Wallingford Energy, LLC v. FERC</i> , 419 F.3d 1194 (D.C. Cir. 2005) ..	41
<i>Pacific Gas and Elec. Co. v. FERC</i> , 306 F.3d 1112 (D.C. Cir. 2002).....	31
<i>Pacific Gas &amp; Elec. Co. v. State Energy Res. Conservation &amp; Dev. Comm’n</i> , 461 U.S. 190 (1983) .....	55
<i>Petal Gas Storage, LLC v. FERC</i> , Nos. 04-1166, <i>et al.</i> (D.C. Cir. August 7, 2007) .....	49
<i>Process Gas Consumers Group v. FERC</i> , 177 F.3d 995 (D.C. Cir. 1999).....	22
<i>Public Service Comm’n of Kentucky v. FERC</i> , 397 F.3d 1004 (D.C. Cir. 2005).....	21
<i>Public Serv. v. Fed. Power Comm’n</i> , 543 F.2d 757 (D.C. Cir. 1974) .....	52

<i>Public Utilities Comm’n of State of Cal. v. FERC</i> , 462 F.3d 1027 (9 <sup>th</sup> Cir. 2006) .....	42
<i>*United Gas Pipeline Co. v. Mobile Gas Service Corp.</i> , 350 U.S. 332 (1956).....	51, 52, 53
<i>United Mun.. Distrib. Group v. FERC</i> , 732 F.2d 202 (D.C. Cir. 1984) .....	22

## ADMINISTRATIVE CASES

<i>*Bridgeport Energy, LLC</i> , 118 FERC ¶ 61,243 (2007) .....	4, 35, 36, 54
<i>Cal. Indep. Sys. Operator Corp.</i> , 115 FERC ¶ 61,172 (2006) .....	62
<i>*Devon Power, LLC</i> , 103 FERC ¶ 61,082 (2003) .....	4, 8, 41, 42, 48
<i>Devon Power, LLC</i> , 107 FERC ¶ 61,240 (2004) .....	4, 9
<i>*Devon Power, LLC</i> , 109 FERC ¶ 61,154 (2004) .....	9, 48
<i>Devon Power, LLC</i> , 109 FERC ¶ 61,156 (2004) .....	10
<i>Devon Power LLC</i> , 110 FERC ¶ 61,313 (2005) .....	61
<i>Devon Power LLC</i> , 110 FERC ¶ 61,315 (2005) .....	61
<i>Devon Power, LLC</i> , 111 FERC ¶ 63,063 (2005) .....	4, 10
<i>Devon Power, LLC</i> , 113 FERC ¶ 61,075 (2005) .....	5, 11
<i>Devon Power, LLC</i> , 115 FERC ¶ 61,340, <i>order on rehearing</i> , 117 FERC ¶ 61,133 (2006).....	1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 21, 24, 28, 29, 30, 36, 37, 38, 39, 40, 41, 43, 45, 46, 49, 53, 56, 60, 63
<i>ISO New England, Inc.</i> , 115 FERC ¶ 61,149 (2006) .....	12
<i>ISO New England, Inc. and New England Power Pool</i> , 117 FERC ¶ 61,132 (2006), <i>order on rehearing</i> , 119 FERC ¶ 61,044 (2007).....	2, 3, 6, 21, 28

<i>ISO New England, Inc.</i> , 119 FERC ¶ 61,161 (2007) .....	12
<i>Midwest Indep. Transmission Sys. Operator, Inc.</i> , 102 FERC ¶ 61,196, <i>Order on Rehearing</i> , 103 FERC ¶ 61,210 (2003) .....	62
<i>New England Power Pool and ISO New England, Inc.</i> , 100 FERC ¶ 61,287 (2002) .....	6, 7
<i>*PJM Interconnection</i> , 119 FERC ¶ 61,318 (2007) .....	48
<i>Southwest Power Pool, Inc.</i> , 116 FERC ¶ 61,289 (2006) .....	50
<i>Trailblazer Pipeline Co.</i> , 87 FERC 61,110 (1999) .....	19, 41

## STATE CASES

<i>Feeney v. Commonwealth</i> , 373 Mass. 359, 366 N.E. 2d 1262 (1977) .....	27
<i>Secretary of Administration and Finance v. Attorney General</i> , 367 Mass. 154, 326 N.E.2d 334 (1977) .....	27

## FEDERAL STATUTES AND REGULATIONS

*16 U.S.C. § 824(b)(1) .....	56, 57, 60
*16 U.S.C. § 824a(b) .....	57
16 U.S.C. § 824e .....	25, 52
*16 U.S.C. § 824f .....	57
*16 U.S.C. § 825l(b) (2000) .....	1, 26
Energy Policy Act of 2005, Pub. L. No. 109-58, § 1211, 119 Stat. 594, 941 (2005) .....	57, 58
18 C.F.R. § 385.213(a)(2) .....	46

<i>Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities</i> , Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), <i>order on reh’g</i> , Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), <i>order on reh’g</i> , Order No. 888-B, 81 FERC ¶ 61,248 (1997), <i>order on reh’g</i> , Order No. 888-C, 82 FERC ¶ 61,046 (1998), <i>aff’d in relevant part sub nom.</i> , <i>Transmission Access Policy Study Group v. FERC</i> , 225 F.3d 667 (D.C. Cir. 2000), <i>aff’d sub nom. New York v. FERC</i> , 535 U.S. 1 (2002).....	59
--	----

## STATE STATUTES

Conn. Gen. Stat. § 3-125 (2005) .....	27
Conn. Gen. Stat. § 35-32 (2005) .....	27
Conn. Gen. Stat. § 42-110d (2005) .....	27
Mass. Gen. Laws ch. 12 § 10 (2004).....	27
Mass. Gen. Laws ch. 12 § 11E (2004) .....	28
Me. Rev. Stat. Ann. Title 35-A, § 101 (2005).....	27

## MISCELLANEOUS

Department of Energy, National Electric Transmission Congestion Study, August 2006.....	6, 7
ISO-NE 2005 Reliability Report, June 1, 2006.....	45

## GLOSSARY

April 13 Order	<i>ISO New England, Inc. and New England Power Pool</i> , 119 FERC ¶ 61,044 (April 13, 2007)
Attorneys General	CTAG and Mass AG
Capacity Clearing Price	The clearing price in the FCA for each Capacity Zone determined in accordance with Section 11, Part III.G of the Contested Settlement and as described in Section 11, Part III of the Contested Settlement
Commission	Federal Energy Regulatory Commission
CONE	Cost of New Entry, as determined in accordance with Section 11, Part III.F of the Contested Settlement
Contested Settlement	The settlement agreement at issue in this proceeding, approved by FERC in the <i>Devon</i> Orders
CTAG	Richard Blumenthal, Attorney General for the State of Connecticut
CT-DPUC	Connecticut Department of Public Utility Control
DCA	Designated Congestion Area
Demand curve	A graphical summary of demand levels using a curve, which plots levels of installed capacity on one axis and the rate to be paid for new entry at any given level of installed capacity on the other axis. This curve is therefore a proxy expression of the quantity of generation capacity that customers are willing to purchase at a give price.
<i>Devon</i> Orders	June 16 Order and Rehearing Order



DOE Congestion Study	Department of Energy National Electric Transmission Congestion Study, August 2006
Export constrained	Limits on a transmission line going outward from an area
FCA	Forward Capacity Auction; the descending clock auction that is to be held annually in accordance with the FCM as described in Section 11, Part III of the Contested Settlement
FCM	Forward Capacity Market
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
ICR	Installed Capacity Requirement; a projection of the minimum amount of capacity required to serve load reliably in the New England region.
IECG	Industrial Energy Consumers Group
ISO	Independent System Operator
ISO-NE	Independent System Operator of New England, Inc.
<i>ISO-NE Orders</i>	October 31 Order and April 13 Order
June 16 Order	<i>Devon Power, LLC</i> , FERC Docket Nos. ER03-563, <i>et al.</i> , 115 FERC ¶ 61,340 (June 16, 2006)
LICAP	Locational Installed Capacity
Locational	Based on location
LMP	Locational Marginal Pricing; a market-based approach to transmission congestion

	management. The LMP mechanism incorporates the cost of transmission congestion into the price of energy.
Load pocket	A major load center which has too little local generation relative to load and is at times unable to import electricity from neighboring sub-regions due to transmission import limits.
MassAG	Martha Coakley, Attorney General for the Commonwealth of Massachusetts
MPUC	Maine Public Utilities Commission
MPUC Rehearing Request	Request for Rehearing and Motion for Clarification of the State of Maine Public Utilities Commission and the Maine Public Advocate, ER03-563-000 <i>et al.</i> , July 17, 2006, R1132.
MPUC Settlement Comments	Comments of MPUC and the Maine Public Advocate Contesting Proposed Settlement, ER03-563-000 <i>et al.</i> , March 27, 2006, R1078.
NECPUC	New England Conference of Public Utility Commissioners
Non-Settling Parties	MPUC, MassAG, CTAG, IECG and others who did not sign the Contested Settlement
October 31 Order	<i>ISO New England, Inc. and New England Power Pool</i> , FERC Docket Nos. ER06-1465, <i>et al.</i> , 117 FERC ¶ 61,132 (October 31, 2006)
Off-peak	Energy supplied during a period of relatively low system demand
On-peak	Energy supplied during a period of relatively high system demand

Order 888	Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), <i>order on reh'g</i> , Order No. 888-A, 62 Fed. Reg. 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), <i>order on reh'g</i> , Order No. 888-B, 81 FERC ¶ 61,248 (1997), <i>order on reh'g</i> , Order No. 888-C, 82 FERC ¶ 61,046 (1998), <i>aff'd in relevant part sub nom.</i> , <i>Transmission Access Policy Study Group v. FERC</i> , 225 F.3d 667 (D.C. Cir. 2000), <i>aff'd sub nom.</i> , <i>New York v. FERC</i> , 535 U.S. 1 (2002).
PER	Peak Energy Rent; the hypothetical amount of infra-marginal revenues that the unit should have received for energy sales (infra-marginal means in comparison to revenues earned by a hypothetical unit that operates on the margin-with its marginal cost equal to the energy market price).
PER adjustment	PER adjusted as an offset against the capacity price otherwise paid to a unit
Peaker	A generating unit that operates a limited number of hours per year during peak demand, and with a capacity factor generally less than 20%
Rehearing Order	<i>Devon Power, LLC</i> , 117 FERC ¶ 61,133 (October 31, 2006)
Resource adequacy	A condition in which a utility or load serving entity has demonstrated that it has acquired sufficient resources to reliably satisfy a

forecast of future loads.

RMR

Reliability Must Run (“RMR”) agreements are contracts between a generator and ISO-NE that commit a generator to provide reliability service in return for fixed monthly payments by load in the affected zone.

Settlement Agreement

The settlement agreement at issue in this proceeding, approved by FERC in the *Devon* Orders.

Settling Parties

A party to the Contested Settlement as listed in Appendix A to the June 16 Order

SWCT

Southwest Connecticut

Transition Payments

Capacity payments to listed ICAP Resources during the Transition Period, the level of which was negotiated by the Settling Parties, as provided in Section 11, Part VIII.B of the Contested Settlement

Transition Period

The period of time commencing on December 1, 2006 and ending May 30, 2010 or as provided in Section 11, Part VIII.I of the Contested Settlement.

ORAL ARGUMENT NOT YET SCHEDULED

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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MAINE PUBLIC UTILITIES COMMISSION,	)	
RICHARD BLUMENTHAL, ATTORNEY GENERAL	)	
FOR CONNECTICUT &	)	
MARTHA COAKLEY, ATTORNEY GENERAL	)	Case No. 06-1403
FOR MASSACHUSETTS	)	
Petitioners,	)	Consolidated
	)	with Nos. 06-1427
v.	)	and 07-1193
	)	
FEDERAL ENERGY REGULATORY COMMISSION	)	
Respondent.	)	

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ON PETITION FOR REVIEW OF ORDERS  
OF THE FEDERAL ENERGY REGULATORY COMMISSION

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BRIEF FOR PETITIONERS

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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the challenged rulings presented for review pursuant to Section 313(b) of the Federal Power Act (“FPA”), 16 U.S.C. § 825l(b) (2000). This case involves review of two orders of the Respondent, Federal Energy Regulatory Commission (“FERC”): *Devon Power, LLC*, FERC Docket Nos. ER03-563, *et al.*, 115 FERC ¶ 61,340 (June 16, 2006), R1129 (“June 16 Order”) and *Devon Power, LLC*, 117 FERC ¶ 61,133 (October 31, 2006),

R1149 (“Rehearing Order”) (collectively, the “*Devon* Orders”). On July 17, 2006, the Maine Public Utilities Commission (“MPUC”), the Attorney General for the State of Connecticut (“CTAG”) and the Attorney General for the Commonwealth of Massachusetts (“MassAG”) (collectively, “Petitioners”), sought rehearing of the June 16 Order. MPUC, and the CTAG jointly with the MassAG, filed Petitions for Review of the *Devon* Orders on December 12, 2006 and December 28, 2006, respectively, which were docketed as Case No. 06-1403 and Case No. 06-1427. By Order dated January 10, 2007, the Court consolidated Case Nos. 06-1403 and 06-1427.

This case also involves review of: *ISO New England, Inc. and New England Power Pool*, FERC Docket Nos. ER06-1465, *et al.*, 117 FERC ¶ 61,132 (October 31, 2006), R1197 (“October 31 Order”), and *ISO New England, Inc. and New England Power Pool*, 119 FERC ¶ 61,044 (April 13, 2007), R1203 (“April 13 Order”) (collectively, the “*ISO-NE* Orders”). On November 29, 2006, MPUC sought rehearing of the October 31 Order, and, on June 8, 2007, filed a Petition for Review of the *ISO-NE* Orders.

On June 21, 2007, the Court granted MPUC’s June 8, 2007 motion to consolidate Case No. 07-1193 with Case Nos. 06-1403 and 06-1427.

FERC’s rulings in the *Devon* Orders in FERC Docket Nos. ER03-563, *et al.* and the *ISO-NE* Orders in FERC Docket Nos. ER06-1465, *et al.*, are final agency

orders and this Court's review is proper. Petitioners timely filed Petitions for Review and Petitioners are parties aggrieved by the *Devon* and *ISO-NE* Orders, as set forth fully in Petitioners' discussion of standing, below.

## **II. STATEMENT OF ISSUES<sup>1</sup>**

1. Whether FERC's decision to accept, as just and reasonable, the Contested Settlement without sufficient record evidence to support the Transition Payments, is arbitrary, capricious and inconsistent with the public interest.
2. Whether FERC's rejection, as irrelevant, of evidence demonstrating that there should be locational pricing in the transition period was arbitrary and capricious.
3. Whether FERC's acceptance of a settlement which deprives non-settling parties of their rights under the Federal Power Act results in a settlement which is unjust, unreasonable and inconsistent with the public interest.
4. Whether FERC is without jurisdiction to implement the FCM mechanism.

## **III. STATUTES AND REGULATIONS**

Pertinent statutes and regulations are reprinted in the attached addendum.

## **IV. STATEMENT OF THE CASE**

This proceeding arose from a dispute regarding the level of compensation generators are entitled to when their units are designated Reliability-Must-Run

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<sup>1</sup> MPUC joins in this Brief for Petitioners with respect to Issues 1, 2, and 3, as contained in Sections A, B and C of the Argument. The MassAG and CTAG join in this Brief with respect to Issues 1, 3 and 4, as contained in Sections A, C and D of the Argument.

(“RMR”)<sup>2</sup> in a chronically constrained area (also known as a “load pocket” or a “Designated Congestion Area” (“DCA”)) in Southwest Connecticut (“SWCT”). On April 25, 2003, FERC directed ISO-NE to establish a market mechanism valuing and compensating New England capacity based on location.<sup>3</sup>

In accordance with the April 25 Order, ISO-NE filed a proposal, on March 2, 2004, for a locational installed capacity (“LICAP”) mechanism.<sup>4</sup> On June 2, 2004, FERC established hearing procedures regarding ISO-NE’s compliance filing,<sup>5</sup> and on June 15, 2005, the Presiding Judge issued an Initial Decision in accordance with the June 2 Order.<sup>6</sup>

On September 20, 2005, FERC held oral argument on the LICAP proposal, and, on October 21, 2005, issued an order giving the parties an opportunity to pursue settlement on an alternative to the LICAP mechanism.<sup>7</sup>

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<sup>2</sup> RMR agreements are contracts between a generator and ISO-NE that commit a generator to provide reliability service in return for fixed monthly payments by load in the affected zone. *Bridgeport Energy, LLC*, 118 FERC ¶ 61,243 at P 41 (2007).

<sup>3</sup> See *Devon Power LLC*, 103 FERC ¶ 61,082 (2003) at P 37, R 40 (“April 25 Order”).

<sup>4</sup> See Rehearing Order at P 6, R1149.

<sup>5</sup> See *Devon Power LLC*, 107 FERC ¶ 61,240 (2004), R190 (“June 2 Order”).

<sup>6</sup> See *Devon Power LLC*, 111 FERC ¶ 63,063 (2005), R861 (“Initial Decision”), R861.

<sup>7</sup> See *Devon Power LLC*, 113 FERC ¶ 61,075 at PP 10-14 (2005), R1012 (“October 21 Order”).



On March 6, 2006, ISO-NE filed a Settlement Agreement to implement a Forward Capacity Market (“FCM”) and a multi-year Transition Period (the “Contested Settlement”).<sup>8</sup> On March 27, 2006, MPUC and the Maine Public Advocate (collectively “MPUC”),<sup>9</sup> and the Connecticut and Massachusetts Attorneys General (the “Attorneys General”) filed comments contesting the proposed settlement.<sup>10</sup>

On June 16, 2006, FERC accepted the Contested Settlement over Petitioners’ objections.<sup>11</sup> On July 17, 2006, MPUC and the Attorneys General filed requests for rehearing,<sup>12</sup> which FERC denied on October 31, 2006.<sup>13</sup>

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<sup>8</sup> R1071.

<sup>9</sup> See Comments of MPUC and the Maine Public Advocate Contesting Proposed Settlement, ER03-563-000 *et al.*, March 27, 2006, R1078 (“MPUC Settlement Comments”). The term “MPUC” refers to both MPUC and Maine Public Advocate with respect to their joint Settlement Comments and Rehearing Request (*see* Glossary and note 13, *supra*); *see also* Reply Comments, R1111.

<sup>10</sup> NSTAR Electric & Gas Corp., *et al.*, Comments in Opposition to Settlement, ER03-563-000 *et al.*, March 27, 2006, R1080 (“NSTAR Settlement Comments”), *see also* Reply Comments, R1095.

<sup>11</sup> See June 16 Order, R1129.

<sup>12</sup> Request for Rehearing and Motion for Clarification of the State of Maine Public Utilities Commission and the Maine Public Advocate, ER03-563-000 *et al.*, July 17, 2006, R1132 (“MPUC Rehearing Request”); Application for Rehearing of the Attorney General of the Commonwealth of Massachusetts, Richard Blumenthal, Attorney General for the State of Connecticut, Massachusetts Department of Telecommunications and Energy, the Energy Consortium, the NEPOOL Industrial Customer Coalition, and NSTAR Electric & Gas Corporation, ER03-563-000 *et al.*, July 17, 2006, R1133 (“Attorneys General Application for Rehearing”).

On September 1, 2006, ISO-NE and NEPOOL jointly filed rules governing the Transition Period provisions of the Contested Settlement. On October 31, 2006, over the protest by MPUC,<sup>14</sup> FERC accepted the filing implementing the transition provisions of the Contested Settlement.<sup>15</sup> On November 29, 2006, MPUC filed a Request for Rehearing, which was rejected on April 13, 2007.<sup>16</sup>

## **V. STATEMENT OF FACTS**

### **A. Background**

#### **1. Locational Marginal Pricing**

On September 20, 2002, FERC approved for New England a series of market reforms broadly termed “Standard Market Design,” or “SMD,”<sup>17</sup> including a system to manage congestion<sup>18</sup> through the locational pricing of energy costs,<sup>19</sup>

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<sup>13</sup> Rehearing Order, R1149.

<sup>14</sup> See Notice of Intervention and Protest of the Maine Public Utilities Commission, Docket No. ER06-1465-000, September 22, 2006, R1184.

<sup>15</sup> October 31 Order, R1197.

<sup>16</sup> April 13 Order, R1203.

<sup>17</sup> *New England Power Pool and ISO New England, Inc.*, 100 FERC ¶ 61,287 (2002) (“SMD Order”).

<sup>18</sup> Congestion occurs when actual or scheduled flows of electricity on a transmission line are restricted below desired levels. See Department of Energy National Electric Transmission Congestion Study, August 2006 (“DOE Congestion Study”) at 3.

<sup>19</sup> See SMD Order at P 27.

called Locational Marginal Pricing (“LMP”). In approving SMD, FERC praised ISO-NE for improving on the then-existing market design, “...particularly in its treatment of congestion management problems through LMP and its superior allocation of congestion costs.”<sup>20</sup>

As part of SMD, ISO-NE proposed to replace the existing installed capacity (“ICAP”) mechanism with a monthly auction modeled after the New York ICAP market, except without a locational component. FERC adopted the proposal with slight modifications, but was concerned that the mechanism lacked a locational component:

The Commission believes that location is an important aspect of ensuring optimal investment in resources, and NEPOOL has not provided sufficient detail as to why a locational requirement would be difficult to implement at this time. Therefore, we direct NEPOOL to develop a locational mechanism ....<sup>21</sup>

## **2. The *Devon* Orders**

These proceedings began with the filing on February 26, 2003 of four cost-of-service RMR contracts for Connecticut generators.<sup>22</sup> FERC realized that the proliferation of RMR contracts indicated that the absence of a locational

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at P 101.

<sup>22</sup> June 16 Order at P 7, R1129.

component in the capacity structure was a market flaw.<sup>23</sup> FERC found that ISO-NE should focus on a market mechanism rather than “stand-alone RMR agreements.”<sup>24</sup> As an interim measure, FERC directed ISO-NE to implement revised bidding rules (called Peaking Unit Safe Harbor, or “PUSH,” bidding) to give low-capacity factor generating units operating in designated congestion areas the opportunity to recover their costs through the market.<sup>25</sup>

PUSH bidding was to be replaced by a “mechanism that implements location or deliverability requirements in the ICAP or resource adequacy market . . . so that capacity within [DCAs] may be appropriately compensated for reliability.”<sup>26</sup> FERC directed ISO-NE to develop such a mechanism.<sup>27</sup>

## **B. LICAP litigation**

On March 1, 2004, ISO-NE filed a proposal to comply with FERC’s directive.<sup>28</sup> The predominant feature of ISO-NE’s proposal for LICAP was a

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<sup>23</sup> *See id.* at P 6, R1129.

<sup>24</sup> *Id.* at P 7 (quoting April 25 Order at P 29), R1129.

<sup>25</sup> *See* April 25 Order at P 33, R40.

<sup>26</sup> June 16 Order at P 7 (quoting April 25 Order at P 37), R1129.

<sup>27</sup> *Id.*

<sup>28</sup> *See* R70.

downward sloping demand curve used to establish the (1) amount of ICAP that must be procured by load serving entities and (2) price for that capacity.<sup>29</sup>

In setting LICAP for hearing, FERC discussed locational differences, noting that load pockets in SWCT and Northeastern Massachusetts were experiencing short-term or long-term reliability problems,<sup>30</sup> but also observing that “there are more generation resources within Maine than are necessary to meet local requirements within Maine or that can be exported from Maine.”<sup>31</sup>

After ISO-NE made its LICAP filing, several parties asked for a further delay in the implementation of a locational capacity proposal. FERC denied the requested delay, stating that it had held since September 2002 that “the region must develop a locational mechanism,” and concluding that “setting a firm date of January 2006 for implementation of the LICAP mechanism *is absolutely necessary, so that a mechanism is in place to appropriately value capacity resources according to their location.*”<sup>32</sup>

In a companion order, regarding whether there should be a separate ICAP zone for SWCT, FERC explained, in response to a supplier concerned about lower

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<sup>29</sup> See *id.* at 16-33.

<sup>30</sup> See June 2 Order, R190.

<sup>31</sup> *Id.* at n.16, R190.

<sup>32</sup> *Devon Power, LLC*, 109 FERC ¶ 61,154 at P 32 (2004), R461 (emphasis added).

prices outside of SWCT, that a lower price in a non-congested area will represent the value of the capacity on a “locational basis” and that a lower price for the capacity in the non-congested area of Connecticut will reflect the relative need for capacity in that area.<sup>33</sup>

FERC set the matter for hearing, limited to the development of various demand curve proposals,<sup>34</sup> and never held a hearing to allow parties to develop a record for an alternative approach.

On June 15, 2005, the Presiding Judge issued an Initial Decision,<sup>35</sup> largely adopting ISO-NE’s proposed demand curve.<sup>36</sup> MPUC, NECPUC and others excepted the Initial Decision,<sup>37</sup> objecting to the exclusion of alternatives to the demand curve approach from the record, and offering an alternative to LICAP for ensuring adequate capacity in New England.<sup>38</sup>

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<sup>33</sup> *Devon Power, LLC*, 109 FERC ¶ 61,156 at P 30 (2004), R460.

<sup>34</sup> *See* June 16 Order at P 9. Under protest, the Maine-Vermont parties filed a demand curve proposal.

<sup>35</sup> *See Devon Power, LLC*, 111 FERC ¶ 63,063 (2005), R861.

<sup>36</sup> *Id.* at P 74.

<sup>37</sup> *See* R887, R889.

<sup>38</sup> *See* Exh. MV-1 at 36-38, R1484 (Offer of Proof); Exh. MV-3, R1486 (Offer of Proof); Exh. MV-4, R1487 (Offer of Proof); *see also* Exh. MV-5, R1488 (Offer of Proof).

On September 20, 2005, FERC held oral argument on the LICAP proposal,<sup>39</sup> following which FERC issued an order giving the parties an opportunity to pursue settlement on an alternative to the LICAP mechanism.<sup>40</sup> While it noted that two alternatives to a demand curve submitted by the state commissions prior to oral argument were not fully developed, FERC offered no opportunity for an evidentiary hearing on the proposed alternatives if the parties did not reach a settlement. The only hearing that was held in this proceeding was limited to the demand curve proposals, which were ultimately rejected.

### **C. The Contested Settlement**

On March 6, 2006, ISO-NE filed the Contested Settlement to implement the FCM. The FCM establishes annual auctions for capacity three years in advance. The first FCM auction is to be held in the first quarter of 2008 for the commitment period of June 1, 2010 to May 31, 2011. The Contested Settlement provides fixed payments (“Transition Payments”) to listed ICAP resources between December 1, 2006 and June 1, 2010.<sup>41</sup> Under certain conditions, these payments could be extended.<sup>42</sup>

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<sup>39</sup> See June 16 Order at PP 10-13, R1129.

<sup>40</sup> See October 21 Order at PP 10-14, R1012.

<sup>41</sup> Contested Settlement at Section 11.VIII.B, R1071.

<sup>42</sup> See *id.* at Section 11.VIII.I, R1071.

Based on installed capacity requirements mandated by FERC,<sup>43</sup> this rate increase could cost consumers approximately between \$5 and \$7 billion dollars over the three-to-four year transition period.<sup>44</sup> The table below shows the estimated annual cost to consumers of the Transition Payments.

Power Year	Transition Payment Rate (kW-month)	Total Cost (\$)
Dec. 2006 - May 2007	\$3.05	\$594,329,100.00
June 2007 - May 2008	\$3.05	\$1,204,783,550.00
June 2008 - May 2009	\$3.75	\$1,500,548,036.25
June 2009 - May 2010	\$4.10	\$1,661,926,975.72
June 2010 - May 2011	\$4.70	\$1,929,902,566.86
Total		\$6,891,490,228.83

The Contested Settlement also sets the standard of review for any changes to the Transition Payments or challenges to prices derived from FCM auctions to the “public interest” standard rather than the “just and reasonable” standard.<sup>45</sup> This provision applies to challenges to the rates brought by settling parties, FERC, and

<sup>43</sup> See *ISO New England, Inc.*, 115 FERC ¶ 61,149 (2006); *ISO New England, Inc.*, 119 FERC ¶ 61,161 (2007).

<sup>44</sup> This estimate is based on the monthly Installed Capacity Requirement (“ICR”) mandated by FERC for the 2006/2007 and 2007/2008 power years, and increasing the ICR for subsequent years by 1.3% load growth forecast per ISO-NE’s 2006 Regional System Plan. See 115 FERC ¶ 61,149 (2006); 119 FERC ¶ 61,161 (2007); 2006 Regional System Plan at 20, available at: [http://www.iso-ne.com/trans/rsp/2006/rsp06\\_final\\_public.pdf](http://www.iso-ne.com/trans/rsp/2006/rsp06_final_public.pdf). The higher end of the range would apply if the Transition Period is extended for an additional year. Additionally, if more generation is available than the ICR, the cost will be pushed upward because under the Transition Period provisions, payments will be made to generators regardless of whether the amount of generation exceeds the ICR.

<sup>45</sup> See Contested Settlement at Section 4.C, R1071.



even non-settling parties.<sup>46</sup>

On March 27, 2006, MPUC filed comments opposing the Contested Settlement, providing evidence that the Transition Payments would cost Maine consumers about \$300 million (a 6% to 10% rate increase) over the Transition Period.<sup>47</sup> This evidence was uncontested. MPUC also provided evidence of the locational ICAP price in the unconstrained area of New York, revealing that locational ICAP had been trading in the range of \$0.50 to \$1.00.<sup>48</sup> Additionally, explaining the effect of an export constraint in the energy market under a LMP market design, Dr. Austin stated that:

...the energy market LMP (Locational Marginal Price) includes a congestion component. If a location is export constrained in a given hour, the congestion component of the LMP is negative. In such cases, additional generation at that location would not be dispatched (or if it were dispatched then other local generation would need to be backed down). In other words, this additional generation would not contribute to the reliability of the grid, due to export constraints.<sup>49</sup>

Dr. Austin provided evidence that Maine was export constrained 42.9% of the time, and that “these constraints were much more prevalent during on-peak hours

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<sup>46</sup> *Id.*

<sup>47</sup> See Affidavit of Thomas D. Austin to MPUC Comments at ¶ 15, R1078 (“Austin Affidavit”).

<sup>48</sup> *Id.* at ¶ 12, R1078.

<sup>49</sup> *Id.* at ¶ 7, R1078.

(72.2% of on-peak hours) than in off-peak hours (20.8%).”<sup>50</sup> Dr. Austin concluded that “additional generation in Maine would have provided little or no reliability benefit to the system in 2005 because the system was transmission constrained during high load hours.”<sup>51</sup>

Dr. Austin also pointed to information in ISO-NE’s Regional System Plan (“RSP”) that drew “a clear picture of the locational need for resources during the transition period.”<sup>52</sup> The RSP found that the transmission interface between Maine and New Hampshire (“the Maine-New Hampshire interface”) “limits receipt of generation output from Maine, including transfers from New Brunswick into New England.”<sup>53</sup> Dr. Austin explained that the RSP-05 data demonstrated that “Maine is transmission constrained and that new capacity there (and in New Hampshire as well) would not contribute to reliability due to transmission constraints,”<sup>54</sup> and concluded that “Maine does not need new resources during this time frame and

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<sup>50</sup> *Id.* at ¶ 8, R1078.

<sup>51</sup> *Id.* at ¶ 9, R1078; *see also* Supplemental Affidavit of Thomas D. Austin to Comments of the MPUC and the Maine Public Advocate in Reply to Comments Supporting the Proposed Settlement at ¶ 6, April 5, 2006, R1094 (“Austin Supp. Affidavit”). (“...when there are constraints in the Real Time Energy Market, Maine generation cannot support the reliability needs of some or all of New England.”)

<sup>52</sup> *Id.* at ¶ 10, R1078.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

new resources built in Maine will not allow other parts of the region to achieve the required level of reliability.”<sup>55</sup>

MPUC’s comments opposing the Contested Settlement asserted that the core requirement of the case – the development of a capacity market based on locationality – was entirely absent from the transitional mechanism.<sup>56</sup> Additionally, MPUC asserted that the Settling Parties failed to provide substantial evidence upon which FERC could base a reasoned decision, especially with regard to the Transition Payments.<sup>57</sup> Specifically, MPUC stated that there was no evidence to support the level of Transition Payments negotiated in the Contested Settlement and further asserted that a “[h]earing would reveal that the transition payments are not just and reasonable because they are far in excess of what is needed by generators to supplement revenues from energy and ancillary markets.”<sup>58</sup> MPUC also stated that if the purpose of the Transition Payments was “to retain existing resources that are needed for system resource adequacy and to attract imports from other markets . . . ,”<sup>59</sup> as posited by Supplier witness Mr. Stoddard, that witness had

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<sup>55</sup> *Id.*

<sup>56</sup> MPUC Settlement Comments at 1, R1078.

<sup>57</sup> *Id.* at 1-2, R1078.

<sup>58</sup> *Id.* at 12, R1078.

<sup>59</sup> *Id.* at 13, R1078.

“failed to show that the *level* of transition payments proposed in the settlement is needed to retain existing Maine generation.”<sup>60</sup> Further, MPUC witness Dr. Austin suggested that most suppliers would remain in operation without any transition payments, because “[g]iven today’s level of gas and oil prices and the role they play in setting market energy prices, many generators who use other fuels are doing rather well.”<sup>61</sup> Dr. Austin also stated that where RMR contracts were permitted during the Transition Period, the overall cost to consumers could be reduced by reducing the Transition Payments and allowing those generators that needed additional revenue to seek RMR contracts. MPUC stated that the benefit of this approach is that FERC “will determine the cost of service for units that are actually need for reliability and will determine whether their revenues fail to cover their cost of service. Having looked at both revenues and costs, the Commission can determine whether payments under an RMR contract are just and reasonable.”<sup>62</sup> MPUC further stated:

In determining what amount of compensation is reasonable, on a cost-of-service basis, the Commission must look at both costs and revenues of the units claiming payment. The proponents of the proposed settlement, however, provide no examination of either side of the equation. As discussed above, if they did, it would show that much lower payment levels would be appropriate for the transitional

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<sup>60</sup> *Id.* (emphasis in original)

<sup>61</sup> Austin Affidavit at ¶ 12, R1078.

<sup>62</sup> MPUC Settlement Comments at 15, R1078.

period.<sup>63</sup>

Another flaw in the Transition Payment structure was that there is no energy revenue adjustment (Peak Energy Rent or “PER”) during the Transition Period as there is in the FCM.<sup>64</sup> MPUC explained that:

The windfall for existing power suppliers will be exacerbated by the lack of a Peak Energy Rent (“PER”) offset during the transition period, like the one that has been incorporated into the FCM, or some other protective mechanism. Because suppliers keep the PER during the transition period, there is no hedge against energy spikes, nor any disincentive for suppliers raising energy prices.<sup>65</sup>

MPUC asserted that the hedge and disincentive functions of a PER adjustment were touted by the Settling Parties as important features of the FCM, and therefore should have been incorporated into the Transition Period as well.<sup>66</sup>

The Attorneys General similarly stated that the Transition Payments were not justified on either as market-based rates or as cost-based rates because “all resources receive the payment without regard to whether such payments would be justified under competitive market conditions.”<sup>67</sup> Neither were the Transition Payments cost-based rates, the Attorneys General pointed out, because “all

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 13, R1078.

<sup>65</sup> *Id.* at 13-14, R1078.

<sup>66</sup> *Id.* at 14, R1078.

<sup>67</sup> NSTAR Settlement Comments at 22, R1080.

resources receive the payment without regard to whether such payments would be justified on cost-of-service grounds.”<sup>68</sup> In addition, the Attorneys General argued that the Contested Settlement was overbroad because the Transition Payments would extend capacity payments to all capacity suppliers, as opposed to targeting payments to need for reliability only.<sup>69</sup> The Attorneys General stated that suppliers should not be entitled to both RMR contracts and Transition Payments during the Transition Period. Finally, the Attorneys General asserted that FERC is without jurisdiction to approve the Contested Settlement, stating that by approving the Contested Settlement, FERC imposed a resource adequacy requirement on utilities in the New England states in direct contravention of the FPA.<sup>70</sup>

In the June 16 Order, FERC accepted the Contested Settlement. FERC also found that the overall result of the Contested Settlement is just and reasonable, concluding that “the parties objecting to the Settlement Agreement” would “be in no worse position under the terms of the settlement than if the case were litigated,” and that the Contested Settlement

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<sup>68</sup> *Id.*

<sup>69</sup> *See id.*

<sup>70</sup> *Id.* at 30, R1080.

achieves an overall just and reasonable result within a zone of reasonableness.<sup>71</sup>

On July 17, 2006, MPUC and the Attorneys General filed Requests for Rehearing. MPUC and the Attorneys General argued that comparing Transition Payments to LICAP rates was arbitrary because there had never been an adjudication of all the underlying assumptions, or legal and factual determinations embodied in the Initial Decision. They also argued that there was no record support for the level of Transition Payments approved in the June 16 Order.<sup>72</sup> MPUC also argued that (1) demand curve data could not determine whether Maine was export constrained because there was no auction under which price separation might occur under the demand curve approach; and (2) the Transition Payments approved in the June 16 Order ignore location and thus cannot be reconciled with FERC's determination that it is essential to value capacity by location.<sup>73</sup>

The Attorneys General argued that FERC erred in approving the Transition Payments because: (1) approval was inconsistent with FERC's rejection of ISO-NE's earlier proposed Transition Payments as out-of-market arrangements (2)

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<sup>71</sup> *Id.* at P 70, R1129, citing *Trailblazer Pipeline Co.*, 87 FERC ¶ 61,110 at 61,339 (1999).

<sup>72</sup> See also IECG Request for Rehearing at 13, R1085 (There is no record evidence that the Transition Payments are reasonable rates for existing generators. All of the record evidence "is for different products under different market regimes...").

<sup>73</sup> MPUC Rehearing Request at 9-11, R1132.

FERC's choice of demand curve parameters to establish a range of price projections was inappropriate; (3) Transition Payments are "pure largesse" to gain supplier sign-on to the Settlement Agreement, because generators that actually require additional financial support for reliability services have negotiated RMR agreements with ISO-NE; (4) certain suppliers that are currently recovering costs (without Transition Payments) will receive Transition Payments while avoiding having to demonstrate that the generators are needed for reliability purposes or are not recovering costs in the energy market; (5) the Contested Settlement is an expensive compromise for New England consumers; and (6) FERC's approval of the Contested Settlement containing the Transition Payments fails to comply with FERC's statutory mandate to protect the public interest from unjust and unreasonable rates.<sup>74</sup>

On September 1, 2006, ISO-NE and NEPOOL jointly submitted a filing implementing the transition provisions of the Contested Settlement<sup>75</sup> to which MPUC filed an intervention and protest.<sup>76</sup>

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<sup>74</sup> Attorneys General Application for Rehearing at 16-19, R1133.

<sup>75</sup> See R1177.

<sup>76</sup> See Notice of Intervention and Protest of the Maine Public Utilities Commission, Docket No. ER06-1465-000, September 22, 2006, R1184.



On September 8, 2006, MPUC filed a Motion to Lodge the DOE Congestion Study. MPUC asserted that the DOE Congestion Study provided additional evidence supporting MPUC's claim that Maine was export constrained.

On October 31, 2006, FERC denied the requests for rehearing of the June 16 Order, reiterating its conclusion that the Contested Settlement, as a package, achieves an overall just and reasonable result.<sup>77</sup> FERC also denied MPUC's Motion to Lodge.<sup>78</sup> On the same date, FERC accepted the filing implementing the transition provisions of the Contested Settlement.<sup>79</sup>

On November 29, 2006, MPUC filed a Request for Rehearing of the order implementing the transition provisions of the Contested Settlement, which was rejected on April 13, 2007.<sup>80</sup>

## **VI. STANDARD OF REVIEW**

The arbitrary and capricious standard of review, which applies to Arguments A, B and C, requires FERC to "consider relevant data and 'articulate a rational connection between the facts found and the choices made.'" *Public Service Comm'n of Kentucky v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005) (citations

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<sup>77</sup> Rehearing Order, R1149.

<sup>78</sup> *Id.* at P 76, R1149.

<sup>79</sup> October 31 Order, R1197.

<sup>80</sup> April 13 Order, R1203.

omitted). “FERC must also explain its choice of a data set in the face of an objection.” *Process Gas Consumers Group v. FERC*, 177 F.3d 995, 1003 (D.C. Cir. 1999). A court reviewing FERC’s approval of a contested settlement will determine “whether the Commission has supplied a ‘reasoned decision’ that is supported by ‘substantial evidence.’” *NorAm Gas Transmission Company*, 148 F.3d 1158, 1162 (D.C. Cir. 1998). Under this standard FERC must “...conform to its prior practice and decisions or explain the reason for its departure from such precedent,” *United Mun. Distrib. Group v. FERC*, 732 F.2d 202, 210 (D.C. Cir. 1984) (citation omitted), and must provide reasoned analysis indicating that prior policies and standards have not been ignored. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). It must also do more than recount the serious arguments presented to the agency; it must give those arguments reasoned consideration. *See NorAm*, 148 F.3d at 1165 (D.C. Cir. 1990).

With respect to Argument D, the standard of review for an agency’s interpretation of its own jurisdiction is set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (“Chevron”). “As a federal agency, FERC is a ‘creature of statute,’ having ‘no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.” *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004) (“CAISO”) (quoting *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir.

2002) quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (emphasis in *Atlantic City*)). Accordingly, ““if there is no statute conferring authority, FERC has none.”” *Id.*

FERC must “demonstrate that some statute confers upon it the power it purported to exercise.” *CAISO*, 372 F.3d at 398; *see also Motion Picture Ass’n of America, Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (“MPAA”).

Under *Chevron*, the court first examines “whether Congress has directly spoken to the precise question at issue.” 467 U.S. 842. If Congress has spoken, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43. Where “the statute is silent or ambiguous with respect to the specific issue,” the court must determine “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. The agency’s statutory interpretation is entitled to deference if it is “reasonable” and not “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 844. No deference is justified, however, “absent a delegation of authority from Congress to regulate in the areas at issue,” *MPAA*, 309 F.3d at 801 (emphasis omitted), and the court need not engage in a *Chevron* step-two analysis at all where the statute gives “a clear answer against the government.” *CAISO*, 372 F.3d at 401 (quoting *Brown v. Gardner*, 513 U.S. 115, 120 (1994)).

## VII. SUMMARY OF ARGUMENT

FERC's conclusions that: (1) "the transition payments result in just and reasonable rates for existing generators;" (2) the transition payments "fall within the reasonable range of capacity prices; and (3) that contesting parties are in no worse position under the Contested Settlement than they would have been through continued litigation,"<sup>81</sup> do not constitute reasoned decision making and are not supported by substantial evidence. Specifically, the record does not contain evidence of the costs or revenues of existing generators and, therefore, there was no reasonable basis upon which FERC could conclude that the Transition Payments constitute "reasonable compensation" or "a reasonable range of capacity prices" for existing generation. FERC unreasonably relied on estimated costs of new generation or the expected prices from demand curve proposals that FERC neither scrutinized or adopted in determining that the Transition Payments constituted are just and reasonable.

FERC acted arbitrarily in finding the Contested Settlement, containing the non-locational multi-year Transition Period, to be just and reasonable where it had repeatedly found the non-locational capacity market unreasonable. In failing to price-differentiate between load pockets and areas with sufficient (or excess) generation, the Contested Settlement approved by FERC failed to fix the very

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<sup>81</sup> June 16 Order at P 89, R1129.

market flaw that FERC sought to correct. Further, FERC acted arbitrarily and capriciously in rejecting, as irrelevant, evidence that supported MPUC's claim that there should be price-differentiation in the Transition Payments between Maine and the rest of New England, as there is in the energy market.

FERC's approval of the Contested Settlement, which contains a provision depriving Petitioners of their statutory rights and abrogating FERC's statutory obligations under FPA Section 206 was arbitrary and capricious. Because Section 4.C of the Contested Settlement directs the application of the "public interest" standard to any challenge of Forward Capacity Auction ("FCA") Capacity Clearing Prices, as well as any changes to agreements regarding the Transition Period, even if the change is proposed by a *non-Settling Party*, FERC's approval of the Contested Settlement containing this provision deprives Petitioners of their statutory rights. The provision does not comport with the purpose of the *Mobile-Sierra* doctrine which allows parties "to voluntarily give up, by contract," their right to challenge contractual provisions under a "just and reasonable" standard.<sup>82</sup> Moreover, FERC's willingness to be bound to the public interest standard with respect to concerns it may have about the reasonableness of the FCA prices or the application of the Transition Period provisions over the next several years is contrary to its statutory obligations under FPA Section 206.

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<sup>82</sup> *Me. Public Utils. Comm'n*, 454 F.3d 278, 283 (D.C. Cir. 2006).

FERC's approval of the *Devon* Orders constitutes an impermissible intrusion upon the states' exclusive jurisdiction to regulate reliability standards and to determine the amount of generation resources to be built within their borders. FERC does not have the statutory authority to establish generation resource adequacy requirements including installed capacity requirements ("ICR") in New England, nor does it have the statutory authority to establish a mechanism, such as the FCM, that is specifically designed to force utilities to meet certain FERC-approved installed capacity requirements. Pursuant to FPA Section 201, the states retain exclusive authority over generation resource adequacy determinations, including the determination of how much generation individual utilities must own or control to reliably serve retail customers, and FERC has no authority to encroach upon the states' exclusive jurisdiction over these determinations.

### VIII. STANDING

As required by Circuit Rule 28(a)(7), each of the Petitioners have standing because MPUC, CTAG and MassAG each timely filed a Petition for Review within sixty days of the issuance of the relevant orders and each is a party aggrieved by FERC's *Devon* and *ISO-NE* Orders.<sup>83</sup> MPUC is the electric utility regulatory body for the State of Maine, and is charged by statute with the duty to ensure safe, reasonable and adequate service and to ensure that the rates of public

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<sup>83</sup> See 16 U.S.C. §825l(b) (2005).

utilities are just and reasonable to both customers and public utilities.<sup>84</sup> CTAG is the chief legal officer of the State of Connecticut, whose responsibilities include the commencement of and intervention in proceedings to protect the State, the public interest and the people of the State of Connecticut, and promote the benefits of competition and to assure the protection of Connecticut's consumers from anti-competitive abuses.<sup>85</sup> CTAG is empowered to "appear for the state . . . in all suits and other civil proceedings . . . in which the state is a party or is interested."<sup>86</sup>

MassAG is authorized by Massachusetts common law and by statute to institute proceedings before state and federal courts, tribunals and commissions that she may deem to be in the public interest,<sup>87</sup> and is specifically authorized by statute to intervene on behalf of public utility ratepayers in administrative proceedings involving financing, rates, charges, prices or tariffs of any electric and gas distribution company doing business in Massachusetts and subject to the

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<sup>84</sup> Me. Rev. Stat. Ann. Title 35-A, § 101 (2005).

<sup>85</sup> See Conn. Gen. Stat. § 3-125 (2005); see also Conn. Gen. Stat. § 42-110d (2005) (Unfair Trade Practices Act) and § 35-32 (2005) (Antitrust Act).

<sup>86</sup> Conn. Gen. Stat. § 3-125 (2005).

<sup>87</sup> Mass. Gen. Laws Ch. 12, § 10 (2004); *Feeney v. Commonwealth*, 373 Mass. 359, 366 N.E.2d 1262, 1266 (1977); *Secretary of Administration and Finance v. Attorney General*, 367 Mass. 154, 163, 326 N.E.2d 334, 348 (1977).

jurisdiction of the Massachusetts Department of Telecommunications and Energy.<sup>88</sup>

Petitioners opposed the Contested Settlement approved by FERC in the *Devon* Orders at issue in this appeal, because the *Devon* Orders will not ensure just and reasonable electric rates in Maine, Connecticut or Massachusetts and will harm consumers in those states. MPUC further asserts that the State of Maine and Maine consumers will be harmed by FERC's *ISO-NE* Orders because the *ISO-NE* Orders implement the Transition Payment portion of the Contested Settlement approved in the *Devon* Orders, which, as set forth above, adversely impacts ratepayers in Maine, Connecticut and Massachusetts.

Accordingly, Petitioners are aggrieved by FERC's *ISO-NE* Orders as they are with the *Devon* Orders, and have standing to seek review of these Orders pursuant to their respective responsibilities and obligations to the citizens of Maine, Connecticut and Massachusetts.

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<sup>88</sup> Mass. Gen. Laws. Ch. 12, § 11E (2004).